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Supreme Court, U.S.
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Case No. 88-1826

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

JOHN G. BARROW, JR.,
Plaintiff / Appellant / Petitioner,

vs.

KING and HERBERT HANCOCK, et al,
Defendants / Appellees / Respondents.

ON WRIT OF CERTIORARI FROM THE U.S. COURT OF APPEALS, ELEVENTH CIRCUIT ATLANTA, GEORGIA

BRIEF IN OPPOSITION FOR RESPONDENTS OGLETHORPE POWER CORP. AND HUBERT H. HANCOCK

GREGORY A. PRESNELL, ESQUIRE
Counsel of Record
JEFFREY S. BADGLEY, ESQUIRE
AKERMAN, SENTERFITT & EIDSON
Firstate Tower, 10th floor
255 South Orange Avenue
Post Office Box 231
Orlando, Florida 32802
(407) 843-7860

Central Repro, Inc. Orlando, Florida 32801 (407) 843-0707

16 pp

QUESTION PRESENTED FOR REVIEW

Whether this Court should exercise its discretion to grant review on Writ of Certiorari where the Petition fails to allege a basis for such review and where the courts below properly ruled on the merits?

ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

1. John G. Barrow
   Plaintiff
2. Richard L. King
   Defendant
3. Hubert H. Hancock
   Defendant
4. Oglethorpe Power Corp.
   Defendant
5. J. J. Hudiberg
   Defendant
6. Florida Power & Light Company
   Defendant
7. Michael S. Mullin
   Defendant
8. Charles Pickett
   Defendant
9. Hazel Jones
   Defendant
10. Gene R. Blackweilder
    Defendant
11. John F. Claxton
    Defendant
12. James Testone
    Defendant
13. Douglas Jones
    Defendant
14. Jim MacLaughlin
    Defendant

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Rule 12, Federal Rules of Civil Procedure 6,9

OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit and the Order of the district court dismissing Petitioner's Complaint are unpublished but have been filed with the court in respondent's lodging.

STATEMENT OF THE CASE

The plaintiff filed his initial Complaint on June 17, 1986, naming as defendants, Richard L. King, "Hubert H. Hancock Oglethorpe PR Corp.", and "J.J. Hudiberg, F.P. & L." (R. 1-1, L. 1). On July 14, 1986, a Motion to Dismiss and a Motion for Sanctions were filed on behalf of Hubert H. Hancock and Oglethorpe Power Corporation. (R. 1-8). The remaining defendants also filed Motions to Dismiss and the plaintiff filed responses. The plaintiff subsequently filed an Amended Complaint adding numerous additional defendants. (R. 1-22, L. 2).

On March 12, 1987, the Magistrate entered his Order of Report and Recommendation, recommending that the plaintiff's Amended Complaint be dismissed for failure to state a claim. (R. 2-49, L. 3). Additionally, the Magistrate determined that the Complaint had been filed for purposes of harassment and that sanctions under Rule 11 were appropriate.

The trial court, by Order dated April 15, 1987, adopted the Magistrate's recommendation that the case be dismissed and that sanctions of costs and attorneys' fees be assessed against the plaintiff. (R. 2-52, L. 4). The matter was again referred to the Magistrate to conduct further proceedings necessary to determine and recommend the appropriate amount of costs and attorneys' fees. (R2-52).

By Order dated May 11, 1987, the Magistrate ordered all interested parties to submit affidavits for attorneys' fees and costs. (R. 2-53). Defendants, Oglethorpe Power Corporation and Hubert H. Hancock, declined to assert a claim for attorneys' fees and costs against the plaintiff. (R.2-53). On January 26, 1988, Magistrate Schlesinger submitted a second Report and Recommendation, stating that no claims for Rule 11 sanctions had been asserted. (R.2-79). The

Magistrate recommended again that the case be dismissed. (R. 2-79). On April 5, 1988, the trial court entered an Order dismissing the case with prejudice. (R. 2-85, L. 5). On April 11, 1988, the plaintiff filed his Notice of Appeal. (R. 2-86, L. 6).

Following submission of Briefs by the parties, the eleventh circuit issued its Judgment, Mandate and a Brief Per Curiam Opinion affirming the trial court's judgment (L. 7). The panel affirmed the district court on the grounds that the Complaint failed to state any facts to support any violation of Petitioner's constitutional rights.

On May 11, 1989, Petitioner's Petition for Writ of Certiorari for review of the eleventh circuit's judgment was docketed in this court (L. 8).

SUMMARY OF ARGUMENT

Petitioner has failed to set forth any of the factors listed in Rule 17, Supreme Court Rules, to justify review by Writ of Certiorari in this court. The lower tribunals gave full and fair consideration to the Petitioner's arguments. Accordingly, this Court should decline to exercise jurisdiction over Petitioner's appeal.

REASONS FOR DENYING THE WRIT

I. PETITIONER FAILS TO SET FORTH A BASIS UNDER RULE 17, RULES OF THE SUPREME COURT OF THE UNITED STATES, FOR REVIEW BY WRIT OF CERTIORARI.

Rule 17 of the Supreme Court Rules sets forth the factors for determining whether a review by Writ of Certiorari is appropriate. The "special and important reasons" for which this court may exercise its discretion to grant a Writ of Certiorari for reviewing decisions of federal courts of appeal include:

a) When a federal court of appeals has rendered a decision in conflict with a decision of another federal court of appeals on the same matter;

b) When a federal court of appeals has decided a federal question in a way in conflict with a state court of last resort;

c) When a federal court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision;

d) When a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this court;

e) When a federal court of appeals has decided a federal question in a way in conflict with applicable decisions of this court.

Rule 17, Rules of the Supreme Court of the United States.

Petitioner asserts multifarious reasons why this Court should grant review of the decisions below. However, Petitioner fails to specify any of the factors set forth in Rule 17. Petitioner makes reference to several statutory provisions pertaining to the district court's original jurisdiction of this case, *i.e.*, 28 U.S.C. §1331, 28 U.S.C §1343; 42 U.S.C §1983. Of course, these are irrelevant to determining whether this Court should grant a Writ of Certiorari for review over the eleventh circuit's decision. Petitioner does assert that the eleventh circuit's decision is in conflict with decisions of other federal courts of appeal. However, he fails to specify any such decisions.

Even the most superficial review of Petitioner's acerbic prose shows that further review of this case is a waste of scarce judicial resources. The petition focuses primarily on Mr. Barrow's dissatisfaction with the Federal Rules of Civil Procedure, which permit the district court to dismiss a complaint for failure to state a claim under Rule 12 (b) (6), obviating the need of responsive pleadings, discovery or trial. The remainder of Petitioner's arguments consist of paranoiac accusations of judicial conspiracy, for which he faults his lack of success in setting forth a claim upon which relief can be granted.

Other than Petitioner's dissatisfaction with the due process afforded him by the Federal Rules of Civil Procedure and the courts below, the only question for consideration by this Court is whether the lower courts properly determined that Petitioner's Complaint failed to state a claim upon which relief can be granted.

II. THE COURTS BELOW CORRECTLY RULED THAT PETITIONER'S COMPLAINT FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Although this court has, in the past, granted certiorari review to determine the adequacy of the allegations of the complaint, *Associated General Contractors v. Carpenters Union*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), petitioner has already been afforded a full and fair opportunity to present his arguments in the courts below. Both courts correctly ruled that Petitioner's Complaint fails to state a claim.

Rule 8 (a) of the Federal Rules of Civil Procedure provides that a pleading must contain a short and plain statement regarding the following:

(1) the grounds upon which the court's jurisdiction depends;

(2) a claim showing that the pleader is entitled to relief; and

(3) a demand for the relief to which he deems himself entitled.

The Petitioner's Complaint fails to allege any of the elements necessary to state a claim for relief against Respondents Hancock and Oglethorpe. *See Windsor v. Pan American Airways*, 744 F. 2d 1187 (5th Cir. 1984).

Although unclear, Petitioner's argument can best be summarized as follows: Petitioner alleges that Respondents Richard King (hereinafter "King"), and others, acting under "color of law", have violated the Petitioner's Constitutional rights. Petitioner argues that King has misused Chapter 163 of the Florida Statutes, regarding land development, by refusing to issue a permit that would enable the provision of electric services to a potential lessee of property on Quail Road, near Callahan, Florida (hereinafter the "Property"). The Petitioner alleges in a conclusory manner that all of the Defendants are engaged in a conspiratorial scheme to restrict access to electricity.[1] The Petitioner argues that each of the Defendants could not achieve this objective acting independently.

The thrust of Petitioner's claim appears to be that the Respondents have unlawfully impeded the potential lessee's ability to obtain electricity. However, there is no allegation that either Respondents Hancock or Oglethorpe are authorized to provide electric sevice to the Property, have denied or refused electric service to the Petitioner or the Property, or that the Property is within Oglethorpe's service territory. Futhermore, there is no allegation that Respondents Hancock or Oglethorpe have committed any illegal, wrongful or improper act.

The federal courts have consistently required specificity in pleadings where a conspiracy to deprive the plaintiff of constitutional rights is charged. *See, e.g., Ostrer v. Aronwald*, 567 F. 2d 551 (2nd Cir. 1977); *Adelona v. Webster*, 654 F. Supp. 968 (D.C.N.Y. 1987). This rule applies equally to pleadings filed by a pro se plaintiff. *Jarrel v. Tisch*, 656 F.Supp. 237 (D.D.C. 1987). General averments of conspiracy or

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[1] Through successive appeals, this conspiracy has enlarged to include all lawyers, judges, court personnel and other individuals whose efforts have frustrated Petitioner's ardent attempts to litigate in federal court.

collusion, without facts which constitute conspiracy or collusion, are conclusions of law and are insufficient to state a claim. *Kalmanovitz v. G. Heileman Brewing Co., Inc.*, 595 F.Supp. 1385 (D.C. Del. 1984), *aff'd*, 769 F.2d 152 (3rd Cir. 1985).

Further, there is no allegation that Petitioner individually owns the Property or has any other legitimate property interest therein to give him standing to sue. The Petitioner complains of the burdensome effect of the regulations on mobile home dwellers, "Home Folks", "Farmer's Children" and Blacks. The Petitioner does not, however, identify himself to be a member of any of these groups. Page six of the Amended Complaint generally alleges that he and his family suffer an injury exceeding $250,000.00. The precise nature of this injury and its connection with the Respondents' alleged wrongful acts is not explained.

As Petitioner has failed to allege any facts necessary to establish a claim for relief against Respondents Hancock and Oglethorpe under Rule 8(a) of the Federal Rules of Civil Procedure, the Complaint was properly dismissed under Rule 12(b).

CONCLUSION

Petitioner has failed to set forth any factors listed in Rule 17 of the Supreme Court Rules to justify review by certiorari. Furthermore, it is clear that the courts below rendered correct decisions on the merits. This Court should decline to exercise its jurisdiction to issue a Writ of Certiorari, thereby terminating Petitioner's vexatious use of the federal judicial system.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail, postage prepaid, this 21st day of July, 1989, to: Mr. John G. Barrow, Jr., Route 1 Box 470, Callahan, Florida 32011; Michael S. Mullin, Esquire, Post Office Box 1563, Fernandina Beach, Florida 32034, and Stephen H. Durant, Esquire and W. O. Birchfield, Esquire, of Martin, Ade, Birchfield & Johnson, 3000 Independent Square, Jacksonville, Florida 32202.

GREGORY A. PRESNELL, ESQUIRE
JEFFREY S. BADGLEY, ESQUIRE
AKERMAN, SENTERFITT & EIDSON
Firstate Tower, 10th Floor
255 South Orange Avenue
Post Office Box 231
Orlando, Florida 32802
(407) 843-7860